91-1292



No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

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Haitian Refugee Center, Inc., et al.
Petitioners,

vs.

James Baker, III, Secretary of State, et al.,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May the Executive, consistent with the First Amendment to the United States Constitution, selectively deny to attorneys and advocacy groups -- while granting to the press, the clergy, lawyers not of record and others -- access to meet and consult with Haitian members of a certified class of litigants who are those attorneys' clients in pending litigation, solely because those attorneys and advocates seek to communicate regarding rights which the Executive claims the Haitians do not possess and where those messages explain and promote views with which the Executive expressly disagrees?

2. Do Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, INA § 243(h), and Executive Order 12324 (Sept. 29, 1981), permit the Executive to return to Haiti persons who face death or persecution upon their return where the procedures used to make those determinations are wholly arbitrary and inadequate?

3. Is judicial review under the Administrative Procedure Act precluded or committed to agency discretion where low-level agency officials use arbitrary and irregular procedures to determine whether Haitians should be returned to the country where they would face death or persecution?

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## PARTIES TO THE PROCEEDINGS

The Petitioners are The Haitian Refugee Center, Inc., a Florida not-for-profit corporation, and Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michael Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil, Condanser Joseph, on behalf of themselves and all others similarly situated.

The Respondents are James Baker, III, Secretary of State, Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard, Gene McNary, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States.

## OPINIONS BELOW

On February 4, 1992, the United States Court of Appeals for the Eleventh Circuit, in a two to one decision on consolidated appeals from the United States District Court for the Southern District of Florida, entered a final order which is unreported. App. 56[1] (Feb. 4 appellate order). The court dismissed as moot Case No. 91-6099, vacated all injunctive orders in Case Nos. 91-6105 and 91-6118, and remanded the cases to the district court with instructions upon remand to dismiss the action because the complaint fails to state a claim upon which relief may be granted. The per curiam panel also issued the mandate forthwith. The decisions giving rise to these appeals were issued on December 18, 20, and 23, 1991 by the district court. None of these decisions are reported. App. 44 (Dec. 18 order), App. 46 (Dec. 20 order), App. 48 (Dec. 23 order).

The three decisions of the district court relied upon and supplemented the district court's initial Order of December 3, 1991, which made detailed findings of fact. App. 42 (Dec. 3 Mem. Op.). The December 3, 1991

[1] Petitioners had submitted on January 31, 1992 an Appendix (Vols. 1-4) in Docket No. A-551 when they were Respondents to the Government's application for a stay. To avoid duplication, we reference and incorporate these 4 volumes of Appendix as the Appendix on this Petition, together with Volumes 5 and 6 of the Appendix submitted with the Stay Application Petitioners filed herewith. All citations will be to the Appendix and will identify the sequential tab number (e.g., "App-___").

Order is not reported. On December 17, 1991 the same panel of the Eleventh Circuit also, in a two to one decision, dissolved the injunction issued December 3, 1991 and remanded the case to the district court, with instructions to dismiss on the merits, Petitioners' claim based on Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees. App. 43 (Dec. 17 appellate order). On January 28, 1992, a petition for *en banc* review of this order was denied. App. 51 (Jan. 28 appellate order). This decision is also not reported.

## JURISDICTIONAL STATEMENT

This Petition seeks review of the judgment of the Eleventh Circuit Court of Appeals of December 17, 1991 denying Petitioners' claims based on Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, the decision of January 28, 1992 denying *en banc* review of that order, and the judgment of February 4, 1992 dismissing Petitioners' claims in all respects, including those based on the First Amendment, the Administrative Procedure Act, the Immigration and Nationality Act, and Executive Order 12324 (Sept. 29, 1981). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims are based on the First Amendment to the United States Constitution, Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees, the Administrative Procedure Act, the Immigration and Nationality Act §§ 208 and 243(h), Executive Order 12324 (Sept. 29, 1981), the Agreement Effected By Exchange Of Notes For Migrant Interdiction Between Haiti and the United States, and Immigration and Naturalization Service ("INS") Guidelines for the Interdiction Program. All relevant sections that are not easily accessible have been included in Petitioners' Exhibit ("P.E. at 1-9").

## STATEMENT OF FACTS

### A. Background

On September 29, 1981, President Ronald Reagan issued Executive Order 12324 concerning the interdiction of aliens seeking to enter the

United States. The purpose of the Executive Order was both to interdict illegal aliens seeking to enter the United States and to ensure "that no person who is a refugee will be returned without his consent." Executive Order 12324, Section 2(c)(3). (P.E. at 2). To achieve both goals, the President directed that "the Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating [Department of Transportation] take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our *international obligations* concerning those who genuinely flee persecution in their homeland." Executive Order 12324, Section 3 (P.E. at 2) (emphasis added).

The Executive Order arose out of the Agreement Effected by Exchange of Notes Between the United States and the Republic of Haiti of September 23, 1981 (P.E. at 4-6). The Agreement made specific reference to the parties' "international obligations mandated in the Protocol Relating to the Status of Refugees" (P.E. at 4), and that the United States would not return to Haiti any persons who "qualify for refugee status." (P.E. at 6).

To comply with the Executive Order and Article 33 of the Protocol, the Immigration and Naturalization Service established Interdiction Guidelines and Operations Instructions. These Guidelines recognize INS' responsibility that the United States be "in compliance with its obligations regarding actions toward refugees" (P.E. at 7), and that one of the sources of authority for its Guidelines and Operations Instructions was Article 33 of the Protocol. (*Id.*)

To comply with the Guidelines, the INS agents aboard Coast Guard vessels are required to identify candidates for asylum as political refugees under U.S. and international law. Haitians identified as potential candidates for asylum are to be "screened in" -- transported to the United States for further proceedings. Those Haitians "screened out" are subject to forcible return to Haiti without further proceedings.[2]

[2] On November 18, the day before this suit was filed, the Respondents forcibly returned to Port-au-Prince 538 Haitians held on the Coast Guard Cutters "Dallas" and "Confidence." *See* App. 11 (Jennings Dep. at 7); App. 12 (Schneider Dep. at 5-6); App. 26 (Baker Dep. at 20). Tragically, the procedures afforded those Haitians were totally inadequate. *See* App. 26 (Baker Dep. at 16-18); App. 11 (Jennings Dep. at 13-16, 31-43, 45, 50, 67, 71-77); App. 12 (Schneider Dep. at 4-6, 11-13, 18-20, 22-24, 29-30). During the period INS officials screened these Haitians, the officials believed, among other things, that *no* Haitians would

This case concerns the wholly "arbitrary" procedures used by low-level INS officials in violation of the President's directives in the Executive Order where the record disclosed that Haitians fleeing their country had a "substantial threat of ... loss of liberty or death at the hands of Haiti's military on account of [their] political beliefs." App. 46 (Dec. 20 order at 7) and App. 42 (Dec. 3 Mem. Op at 55). At the same time, these government officials collectively barred Petitioner Haitian Refugee Center, Inc. ("HRC") and counsel representing the class of Petitioners in this case from meeting with and speaking with their clients, "to assist the Haitians in understanding and navigating through the predicament in which our government placed them." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6).

The district court, in finding that "the largely liberty - and life - implicating threats of injury to plaintiffs outweighed the largely financial threat of harm to defendants," nevertheless entered a limited injunction which prevented the Respondents from returning Haitians to Haiti only until such time as they could "implement and follow procedures, such as the INS Guidelines, which are adequate to insure that class members are not forcibly returned to a country where, on account of their political opinion, their life and liberty are threatened ..." App. 42 (Dec. 3 Mem. Op. at 61). In so doing, the district court stressed that the relief provided "herein does *not* grant plaintiffs entry to this country, but merely prohibits their forced return to Haiti ..." App. 42 (Dec. 3 Mem. Op. at 62).

The district court's injunctive order concerning the First Amendment right to access was equally narrowly drawn. In finding that the Respondents had "opened the [Guantanamo] camps to members of the press and to representatives of the United Nations High Commission on Refugees," that "the portions of the military installation to which HRC seeks access are not used for military purposes [but] serve the non-military function of detaining refugees," and that HRC's right of access is magnified "because of the increased likelihood that interdictees returned to Haiti will face persecution or death," the district court enjoined the Respondents from forcibly returning Petitioners to Haiti only until HRC

actually be returned, and reviews and reinterviews of "doubtful" cases "screened out," on that mistaken assumption, were never done. *See* App. 4, Exhibit F (Beyer Dep. at 133). At least four of those returned Haitians are known to be in hiding, App. 3, Exhibit A (McCalla Aff. at ¶ 40), and forty-two (42) persons have now fled a second time. *See* Declaration of James A. Rogers of Feb. 9, 1992, Exhibit A, submitted with Petitioners' Application for Stay and this Petition.

had an opportunity to exercise its First Amendment right of access to class members. Despite the government's contrary suggestion, the district court did *not* direct Respondents to *assist* HRC in exercising their rights or require Respondents to take any *affirmative* action, but simply prohibited content based denial of access and left to the government the determination as to "reasonable, content-neutral, time, place and manner restrictions." App. 46 (Dec. 20 order at 9-10). Respondents refused to set any conditions and have enforced a total ban on access.

### B. The Relative Harm To The Parties

In entering its injunctions in this case, the district court weighed the relative harms to the parties. While finding the Respondents' harm to be monetary and otherwise largely "speculative," the district court repeatedly found that if Petitioners were returned to Haiti they would face a substantial likelihood of persecution or death at the hands of the Haitian military. App. 42 (Dec. 3 Mem. Op at 5) and App. 46 (Dec. 20 order at 9). These findings were well supported in the record and never challenged.

On September 30, 1991, President Aristide, the leader of Haiti's first democratically elected government in over 200 years, was overthrown by a military coup that the U.S. and the Organization of American States ("OAS") have condemned. To escape the junta's repression, increasing numbers of Haitians have fled the country by sea, many only to be interdicted by the U.S. Coast Guard, accompanied by Immigration and Naturalization Service ("INS") agents, enforcing U.S. immigration laws extraterritorially on the high seas.[3]

[3] Petitioners refer this Court to the district court opinion which succinctly describes the Alien Migration Interdiction Program ("AMIO") and the prior procedural history of this case. *See* App. 42 (Dec. 3 Mem. Op. at 2-10). Many of the Haitians interdicted since the September 30 coup were not headed to the United States in the first place. *See* App. 2, Exhibit A (Jolicoeur Aff. at ¶ 6) [originally headed for the Bahamas]; App. 15 (Alexis Dep. at 7) [fled Haiti without any particular destination in mind]; App. 12 (Schneider Dep. at 18) [came across people heading to Cuba who were interdicted and detained]; App. 26 (Baker Dep. at 57-58) [interviewed people not going to the U.S. who were detained in Guantanamo]. Respondents have advanced no explanation as to their authority or justification for interfering with *those* Haitians attempting to escape political persecution in Haiti, let alone to forcibly return them to Haiti. Surely the Respondents have no legitimate interest in enforcing U.S. immigration laws against

Only the district court orders protected the Haitian Petitioners from the risk of "loss of liberty or death at the hands of Haiti's military on the account of [their] political beliefs." App. 42 (Dec. 3 Mem. Op. at 55). The deadly seriousness of that "danger" is apparent from the testimony of the individual Haitian Petitioners, all of whom "despite having substantial political asylum claims were 'screened out,'" and thus marked for Coast Guard forcible return to Haiti. *Id.* at 55-57.

For example, Petitioner Golbert Miracle, a member and organizer for the Lavalas and the FNCD (both pro-Aristide groups) testified that he fled Haiti to escape the military after his mother had been killed and his aunt and one of his sisters arrested:

> Q. You said your mother was killed. How was she killed?
>
> A. When the military man came, no one would open the door. He forced himself in. They broke down the gates and they went in. ... My brother, younger brother, and my sister, they found out where I was and once they found out where I was, they are the ones to tell me that my mother was killed, was shot, that my aunt was arrested and one of my sisters was also arrested.

App. 20 (Miracle Dep. at 5-7). Petitioner Emanuel Saintil, a founding member of a pro-Aristide youth group, Movement of the Young of Cite Soleil, saw his father shot dead in front of a church because of his political affiliations:

> A. . . . My father went out to get some food to put on the table. As he was coming home, there were some soldiers in the neighborhood who know me as a militant for MGSS. Because they live in the neighborhood, they pointed the finger at my father to other soldiers, and they had my father killed. They shot my father in front of the Church of the Emaculate Conception in Cite Soleil.
>
> Q. You say you went out to look at your father's body. Did you see your father's body? Yes or no.
>
> A. Yes, I had time to see the body.

App. 23 (Saintil Dep. at 16-20).[4]

people seeking refuge in other foreign countries.

[4] INS similarly screened out other Petitioners. Petitioner Condanser Joseph, a founding member of a group which performed political theater in support of the FNCD, testified that soldiers looking for him shot up his house, killing his

The danger that these Haitian Petitioners face is documented by lengthy and detailed accounts by human rights groups describing the current reign of terror in Haiti.[5] A consortium of human rights groups in Haiti reported to the United States Congress that:

> The repression recorded since the beginning of the military coup has accelerated during the past few weeks, especially since the arrival of [an OAS] mission ... Summary executions, arbitrary arrests and desertions, torture, searches without warrants and under violent conditions, sacking of private and public properties, infringements of all freedoms of movement, speech, meeting and association ... The list of human rights violations lengthens every day and even increases with the clear intention of setting a reign of terror.

App. 2, Exhibit D at 2.

The Lawyers Committee for Human Rights reports, among other atrocities, that:

- On Thursday, November 14, journalists discovered the bodies of seven young men who had been executed. Their wrists were tied with electrical cords and their bodies had numerous bullet wounds. The bodies had been dumped alongside a road near a burial ground used by the Duvaliers to bury their victims.
- Casimir Rosalvo was arrested during a military raid in a poor neighborhood in Goaives on November 11. Soldiers then tortured him, particularly his genitals, ears and eyes.

App. 2, Exhibit D at 7-8.

younger brother. App. 17 (Condanser Dep. at 9-10). *See also* App. 21 (Pierre Dep. at 7, 11, 22) [member of FNCD, the political coalition supporting Aristide, fled after the military showered his home with bullets, killing his father]; App. 22 (Providence Dep. at 8, 17) [a long-time Aristide supporter who fled after the military shot up his house looking for him]; App. 19 (Jean Dep. at 7-9) [member of Komite Ti Legliz (the Aristide Church Organization) fled after police shot up his house and arrested his father, a known Aristide supporter]; App. 18 (Frantz Dep. at 8-9, 12-13) [member and candidate of Lavalas, a pro-Aristide movement, fled after he escaped military arrest]; and App. 14 (Charles Dep. at 5-7) [an organizer of a party supporting Aristide fled after the military came to his house to arrest him].

[5] The INS relies on just such reports for information about "country conditions," which is crucial to the screening process. App. 27 (Beyer Dep. at 45-46) [Chief Asylum Officer testified that he relies on independent reports from Lawyers Committee on Human Rights and the National Coalition of Haitian Refugees].

Our government repeatedly condemned the terror and persecution rampant in Haiti since the coup:

- President Bush ordered an embargo of Haiti citing the "grave events in [Haiti] that are ... disrupt[ing] the legitimate exercise of power by the democratically elected government. ...," App. 1, Exhibit E (Oct. 28, 1991 Exec. Order), and Respondent Baker vowed before an emergency OAS meeting to make the outlaw regime "a pariah in the western hemisphere." App. 79 (N.Y. Times, Oct. 4, 1991, at A8 col. 1);
- The U.S. delegate to the UN declared to the General Assembly that the U.S. "does not and will not recognize the self-appointed junta which has illegally usurped power in Haiti." App. 80 (N.Y. Times, Oct. 12, 1991, Sec. 1, 32 col. 2).

In its opinion of Dec. 20, 1991 the district court made supplemental findings that there were "worsening political conditions in Haiti since issuance of the [Dec. 3, 1991] opinion ..." App. 46 (Dec. 20 order at 5). Indeed, Respondents do not deny "the brutality or illegitimacy of the current regime in Haiti." *See* App. 34 (Plaintiffs-Appellees' Memorandum at 8). Instead, in a transparent attempt to divert the Court's attention from the lives at stake on this Petition for Review, Respondents would have this Court believe that the political conditions within Haiti have nothing to do with this case. *Id.* This is simply not so.[6]

In contrast to this obvious irreparable harm to Petitioners, the district court found that the Respondents' harm was monetary, and its other claims were "largely speculative." App. 42 (Dec. 3 Mem. Op. at 61).[7]

[6] The current conditions within Haiti are directly relevant for two reasons. First, the district court's holding that "the individual [Haitian] plaintiffs have shown a substantial threat that the absence of injunctive relief will cause the *most* irreparable type of injuries," was based directly on the Haitian Petitioners' testimony describing the political conditions in Haiti. App. 42 (Dec. 3 Mem. Op. at 59) (emphasis added). Second, as the Respondents' own witnesses admit, "country conditions" are crucial to an adequate determination of a political asylum claim. *See, e.g.*, App. 3, Exhibit K (Beyer Dep. at 104); App. 11 (Jennings Dep. at 74); App. 13 (Tilbury Dep. at 9).

[7] The district court's findings have never been challenged as clearly erroneous by the Respondents. Nor did the court of appeals suggest these findings were in error, as the panel majority failed to address any facts in its opinion relating to irreparable harm or the balance of harms. The Respondents sought an end run around this factual record by submitting affidavits in connection with their motions

### C. The Government's Screening Procedures Are Inadequate To Protect Haitian Appellees From Unlawful Repatriation

In light of the irreparable harm evidenced in the record, the district court reviewed the procedures that were used to make determinations with regard to screening Haitians fleeing Haiti. In practice, the screening was deficient in every respect. INS officers, with no training or knowledge about Haitian politics or culture, screened Petitioners.[8] They were supervised by equally ignorant INS officials who, in any event, almost never reviewed determinations made by subordinates.[9] In fact, officers

for a stay in the circuit court and in this Court. Those affidavits, however, when tested do not support any assertion that any person or institution will suffer irreparable harm or sufficient injury to outweigh the irreparable harm to Petitioners. *See* Petitioners' Application to Recall and Stay the Mandate of the United States Court of Appeals for the Eleventh Circuit Pending Certiorari and for Expedited Treatment of the Appeal.

[8] Leon Jennings, Chief of the Asylum Prescreening Unit based in Miami, who was detailed to Guantanamo on November 16, 1991 to oversee the interview process, John Baker, his assistant, as well as asylum officers directly doing interviews of Haitians on Guantanamo, knew almost nothing about current conditions in Haiti. App. 11 (Jennings Dep. at 74-77), App. 26 (Baker Dep. at 30-31), App. 12 (Schneider Dep. at 36-37), App. 13 (Tilbury Dep. at 10). These officers, while interviewing Haitians fleeing persecution, could not name or recognize the following: the President and Prime Minister of the de facto regime; the general (Cedras) at the head of the military coup; the popular name for President Aristide; Ti Ligliz (church movement of President Aristide); La Fami Salivi (the orphanage established by President Aristide); and many others. Jennings, in fact, did not know that the Haitian Red Cross was not a member of the International Red Cross -- significant because Respondents turned repatriated Haitians over to the Haitian Red Cross. App. 11 (Jennings Dep. at 74-77).

[9] Jennings never reviewed any of Asylum Officer Schneider's interviews, notwithstanding the fact that Schneider interviewed scores of Haitian refugees before he had any information about the political conditions in Haiti, App. 12 (Schneider Dep. at 8-9), that Schneider had received no training concerning Haitian culture or the nuances in interviewing Haitians before he arrived (*Id.* at 22), that he received no instructions about the interview forms used *(Id.* at 6), and that he was not able to identify the names of widely known Haitian political figures and organizations after almost two weeks of conducting hundreds of interviews (*Id.* at 36-37).

interviewed applicants without knowing the proper standard to apply, App. 13 (Tilbury Dep. at 6-7), or without receiving any information concerning the political conditions in Haiti until days after interviews were completed and persons forcibly returned.[10] Recordkeeping was also in complete chaos. Respondents did not even bother to keep track of who had been "screened-in" and who had been "screened-out." Overworked and inexperienced INS interviewers on the cutters disposed of individual claims in just a few minutes.[11]

These conditions prompted Gregg Beyer, Chief Asylum Officer who was responsible for screening decisions made before November 16, 1991, to conclude on November 12, 1991 that the interview process should be suspended. *See* App. 3, Exhibit K (Beyer Dep. at 74-90). He found the interviews were "increasingly inconclusive" and "also of rapidly decreasing validity." A superior to Beyer returned the memorandum to him, did not discuss it, and, through a subordinate, instructed Beyer to "file it." Promptly thereafter, Beyer's supervisor relieved him of his pre-screening responsibilities. *Id.* at 74-90.

These procedural deficiencies were accompanied by clear instances of

[10] Asylum Officers Baker and Schneider went aboard the Coast Guard cutter Dallas and began conducting interviews almost immediately upon arriving at Guantanamo on November 17. App. 26 (Baker Dep. at 19); App. 12 (Schneider Dep. at 5-6, 8). Neither of them, however, was provided with any information about political conditions in Haiti until, at the earliest, November 21 -- and then the information was "mostly newspaper articles." App. 26 (Baker Dep. at 24-28); App. 12 (Schneider Dep. at 8-9). Thus, among the Haitians forcibly returned to Haiti on November 18 were Haitians whose *only* screening procedure was conducted by officials with *no* information about the political conditions in Haiti, and no experience interviewing Haitians.

[11] As Judge Atkins noted, the Respondents attempt to "minimize" the certain harm to these Haitians by pointing to "follow-up procedures" to monitor the safety of repatriated Haitians. App. 42 (Dec. 3 Mem. Op. at 58). However, as the INS Chief Asylum Officer testified, formal follow-up visits for those returned pursuant to the Interdiction Program ceased in 1985. App. 3, Exhibit K (Beyer Dep. at 56-58). The Respondents' misguided attempt to convince the district court that the Haitian Red Cross provides essential monitoring and safety functions also fails. As Judge Atkins found, the Haitian Red Cross is a not a member of the International Red Cross, and is not "independent of government interference and pressure." App. 42 (Dec. 3 Mem. Op. at 59). *See also* App. 3, Exhibit A (McCalla Decl. at 12).

refusal to provide a meaningful interview to Haitians with extremely strong claims for political asylum. Golbert Miracle, for example, whose mother was killed and aunts were arrested and disappeared, was given a four question, *three minute* interview where the interpreter -- *not* the asylum officer -- asked the questions. This "interview" was clearly not designed to elicit pertinent information:

> Q. What were the first things that the interpreter said up to then?
>
> A. He started to say, "Everybody comes here and talks about one thing, politics, politics. *Whatever you do, you are going to be sent back. Whatever you do.*"

App. 20 (Miracle Dep. at 15-17).[12]

The testimony revealed that the pre-screening procedures were, either purposefully or through indifference, a complete and utter sham -- a "formal" validation of a predetermined result. The district court found that "all [of] the individual plaintiffs described below were interdicted at sea *and, despite having substantial political asylum claims, were 'screened out,' i.e.*, marked for forcible return to Haiti." App. 42 (Dec. 3 Mem. Op. at 56-57).

[12] Raymond Edme, for example, was never asked what AJN, an organization he belongs to that supports Aristide, is or what work it does. App. 16 (Edme Dep. at 8). Roland Providence, for example, was rushed through his interview:

> Q. Did she ask you why you left Haiti?
>
> A. No. . . . I told her that I worked for Caritas, and that that I was a motivator for the Ti Legliz, that's all, because they were rushing us. They didn't ask us any other questions, and I didn't have time to express my point of view and my problems.

App. 22 (Providence Dep. at 18-19).

Further, many Haitians were given "unsympathetic" interviews. Enold Edmond told of the harsh and "unsympathetic" attitude and that he "did not translate to the officer all that the Haitian was telling him." App. 8 (Edmond Aff. ¶ 3). *See also* App. 9 (Ylnaud Aff. at ¶ 13) ["the interviewer sometimes doesn't ask too many questions or the way they ask it does not get all these details"]; App. 6 (Joseph Aff. at ¶ 3) ["It is possible that some of the 244 persons sent back to Haiti, as Edward was, were afraid to tell this Haitian woman (interviewer) their story because they, like I, did not know who she worked for"]; App. 7 (Hora Aff. at ¶ 13) ["Everyone's interviews lasted about five minutes or less"].

### D. The Government Has Maintained A Total Ban On Access By HRC And Class Counsel

While low-level INS officials engage in arbitrary proceedings concerning Petitioners' asylum claims, the position of the Respondents has been to ensure that "while the interdictees are detained on the Coast Guard cutters and the Guantanamo Naval Base, they are denied information concerning their rights, the availability of counsel, and assistance in making their asylum claims." App. 42 (Dec. 3 Mem. Op. at 44-45).[13]

The Respondents have denied the Haitian Refugee Center[14] and class counsel access to Haitians kept at the part of the Guantanamo facility used as a refugee camp. While "the government has opened the camps to members of the press and to representatives of the United Nations High Commission on Refugees," App. 46 (Dec. 20 order at 9), and allowed in ministers, App. 68 (Wenski aff. at ¶ 2), and even other lawyers, App. 51, Exhibit A (Punancy aff. at ¶ 2), they maintain an absolute bar against class counsel and HRC speaking with the Petitioners. In short, the Respondents

[13] At the present time, Petitioners interdicted by Respondents are kept at a part of the Guantanamo Naval Base that serves "the nonmilitary function of detaining refugees." App. 46 (Dec. 20 order at 9). The lease between the United States and the Republic of Cuba concerning the land for the Guantanamo Naval Base provides that "during the period of occupation by the United States said areas under the terms of this agreement, the United States shall exercise complete jurisdiction and control over and within said areas ..." App. 30.

[14] The Haitian Refugee Center is a nonprofit membership corporation whose purpose is "to promote the well being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation and social and referral services." App. 62 (Second Amended Complaint at ¶ 7). In this capacity, "it has brought substantial lawsuits challenging procedures and practices of the INS in processing Haitian refugee applications and has been recognized by the INS as a source of legal counsel for indigent Haitians." *Id.* The Respondents have totally banned HRC from speaking with or having any access to Haitian refugees at the Guantanamo Naval Base. As a result, the district court found that there was "a substantial likelihood that denying HRC the opportunity to meet, speak with and solicit its members results in personal and concrete harm to HRC." App. 42 (Dec. 3 Mem. Op. at 13).

"ha[ve] allowed access to the refugees to many individuals and groups. But it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6).

In addressing this issue, the district court attempted to fashion a narrow remedy which would allow HRC and class counsel access to Haitians on Guantanamo and not establish a complete ban on repatriation. The district court mandated *no* affirmative expenditure or other government action, but simply ordered Respondents "to grant plaintiffs' counsel meaningful access, before repatriation, to the interdicted class members, leaving the Respondents free to establish reasonable time, place and manner restrictions and to repatriate Haitians after Petitioners' counsel had a meaningful opportunity of access to the class members. App. 46 (Dec. 20 order at 10). The district court concluded that the additional evidence regarding the conditions in Haiti "magnifies the importance of HRC's right of access because of the increased likelihood that interdictees returned to Haiti will face persecution or death." App. 46 (Dec. 20 order at 9).

In its first order, the panel majority of the court of appeals did not reject HRC's First Amendment right of access to Haitians on Guantanamo, but said simply that the court's injunction failed "to redress the right asserted by HRC" because "the District Court does not require defendants to allow HRC access to the Haitian interdictees ..." App. 43 (Dec. 17 appellate order at 4).

In its Order of February 4, 1992, however, the panel majority determined that HRC did not possess a right of access to the interdicted Haitians, and even if they had a right to associate with the Haitians, "this right of association would not give rise to the right of access that HRC claims." App. 56 (Feb. 4 appellate order at 34).

Judge Hatchett in dissent, however, noted that the panel majority's conclusions were reached by ignoring existing binding *en banc* precedent, by alleging facts "unsupported by the record before the court," and by flouting "a recognized canon of the legal profession [that] [l]awyers must have access to their clients so they may advise them of potential rights and causes of action in American courts." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 5, 8-9).

Finding also that "the record reveals that the government has indeed discriminated against HRC based on the content of its speech," and that "it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them," Judge Hatchett would have ordered the

Respondents to grant such access subject to reasonable time, place and manner restrictions.[15]

## ARGUMENT

### I. THIS CASE RAISES ISSUES OF GREAT NATIONAL IMPORTANCE WARRANTING THE GRANT OF CERTIORARI

This case concerns the liberty and fate of thousands of persons fleeing oppression and the interpretation of our solemn treaty commitments and rights under domestic law pertaining to the treatment of persons fleeing persecution. It also raises grave concerns relating to the administration of our immigration laws and the authority of low-level administrative officials to frustrate our nation's solemn treaty and domestic law obligations.

Notwithstanding the deeply rooted Constitutional tradition that ours is a government limited by law, the panel majority below ruled that when the government has interdicted refugees fleeing persecution, prevented them from reaching our borders and thus invoking our laws, it may act in a wholly arbitrary manner, even when life and liberty are threatened, without any judicial scrutiny whatsoever.

The panel majority of the court of appeals has held that this action is totally insulated from judicial review. This ruling raises grave concerns relating to the administration of justice and the integrity of the judicial process.

Most fundamentally, the Court should also grant review of the significant national question of whether our government may hold individuals incommunicado and totally bar access to them by their own attorneys, thereby frustrating their ability to represent them in proceedings in federal court, thus interfering with the integrity of the judicial process. The panel majority's opinion below does nothing less than bless unfettered content-based executive regulation of speech. It also permits an unprecedented total ban on access of any kind by attorneys to clients they

[15] The intentional discrimination by the Respondents against class counsel was subsequently demonstrated in the deposition of John W. Cummings, Acting Assistant Commissioner for Refugees, Asylum and Parole. Mr. Cummings candidly admitted that the INS did not want lawyers on Guantanamo because they would advise the Haitians "as to the process" and, thus, infect it. He thought that "it is unnecessary" for a lawyer to advise a Haitian who is being prescreened as to what the procedure is in his interview. App. 71 (Cummings Dep. at 76, 88).

already represent by stashing them in places they claim are immune from any access. This total ban raises the gravest of First Amendment concerns here because those attorneys are employed by a United States political association seeking to effectuate its organizational purposes by communicating with the organization's members -- individuals whose interests it seeks to serve in an effort to assert their legal rights in the courts and in existing administrative proceedings in which they are involuntarily involved -- and to focus public attention on governmental conduct of a particularly controversial nature.

In sum, low-level executive officials have denied the Haitian refugees substantive and procedural rights that are mandated by treaty, statute, executive order and administrative directive. Contrary to the First Amendment, the Executive has selectively denied the Haitians' counsel access to them to discuss and assert those rights. The panel majority has dismissed the refugees' claims and declared the Executive's action unreviewable, violating "well-established principles of American law" and controlling case law, App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2), ignoring and distorting the record (*Id.*) at 4, 5, 8-9), and making appellate findings of fact unsupported by record evidence (*Id.* at 8-9). The Executive would now have this Court close the circle by denying review. This Court should grant review to reassert the rule of law with regard to these important national issues.

### A. This Case Raises Grave Problems Concerning The Exercise Of First Amendment Rights

This case raises profound questions as to the right of the Executive Branch to exclude selectively persons and organizations based on the political or legal content of their message, when the Executive Branch is an interested party. Although the First Amendment bans any law abridging free speech, the court below permitted a total ban on such speech by a political association seeking to exercise its First Amendment rights to have its attorneys associate with and communicate to individuals held in custody by the government. The panel majority's decision leaves in place the Respondents' heretofore successful efforts to selectively prevent HRC and class counsel - and them alone - from visiting and meeting with counsel's clients. While Respondents have allowed the press, ministers, other organizations, and even other lawyers to speak with class counsel's clients and members, they have intentionally precluded HRC and class counsel from any form of communication with their clients and members.

The Respondents not only thwart Petitioners' efforts to come to the

United States where they would have counsel, they subject them to a sham process regarding their asylum claim, incarcerate them in refugee camps, and as their gatekeepers, selectively exclude not *all* who seek entry as advocates, but only those who have a particular legal and political message to impart.

Contrary to the majority below's attempt to mischaracterize this case as involving regulation on the time, place and manner of the exercise of First Amendment rights, what is upheld is nothing less than a total ban on access. The district court's limited injunction granted merely some right of access, "subject to reasonable, content-neutral, time, place and manner restrictions." App. 40 (Dec. 20 order at 11). Frustration of the Haitian Refugee Center's political and associational rights by the panel majority undermines the core values of the First Amendment in promoting public discussion of governmental affairs and exposing governmental conduct to public scrutiny through full expression. *See* Blasi, *"The Checking Value" of the First Amendment*, 1977 Am.B.Found.Res.J. 521 (1977). The panel's actions also:

> Flouts a recognized canon of the legal profession. Lawyers must have access to their clients so they may advise them of potential rights and causes of action in American courts. Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforcible in American courts and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interest, because of a prior determination that they have no rights that justify meeting with American lawyers. Obviously, such a determination of the Haitians' rights should be made only after they have received the benefit of counsel.

App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 9).

Under the panel majority's holding, lawyers representing multinational corporations abroad could be banned from doing so, a non-United States citizen charged with a crime on a military base abroad could be held incommunicado and prevented from seeing a lawyer, and a foreign leader kidnapped and detained by U.S. authorities abroad could be cut off from counsel seeking to challenge those actions. On the facts of this case, deprivation of a lawyer was designed precisely to prevent persons from

knowing or effectuating their legal rights.

### B. This Case Presents A Substantial Question Regarding Our Country's Treatment Of Persons Fleeing Oppression

In statute (8 U.S.C. § 1253(h)), Senate ratified treaty (Article 33 to the U.N. Protocol), and presidential decree (Executive Order 12324), the Executive is charged with carrying out U.S. immigration law which incorporates an absolute and mandatory prohibition against the return of political refugees to a country where they face persecution or death because of their political views. Substantive legal rights -- such as the mandate that *no* political refugee be returned without his consent -- are enforceable through the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, even where the source of the substantive right itself may not directly provide an enforcement mechanism. Indeed, it is the purpose of the APA to provide remedial redress of substantive rights in exactly such cases. In this case, the district court found that Respondents would face "loss of liberty or death at the hands of Haiti's military ..." App. 42 (Dec. 3 Mem. Op. at 55).

Notwithstanding these findings, the panel majority's conclusion was that such persons fleeing oppression have no legal rights whatsoever and have no protection under domestic law or our solemn commitments under Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees ("Article 33"). This Court, just this term on two separate occasions, recognized our country's mandatory "obligation" under Article 33. *See United States v. Ray*, ___ U.S. ___, 112 S.Ct. 541, 543 n.1 (1991); *INS v. Doherty*, ___ U.S. ___, 60 U.S.L.W. 4085, 4090 (U.S. Jan. 15, 1992) (Scalia, J., concurring in part & dissenting in part, joined by Stevens and Souter, JJ.).

The panel majority, similarly, found that Executive Order 12324, INA §§ 208 and 243(h), and the Administrative Procedure Act provide no enforcible rights to curb any arbitrary or abusive actions by our government toward people fleeing oppression. Under the panel majority's holding, low-level government officials, in open disregard of the President's express directives under the Executive Order to protect refugees and Article 33's command not to return persons to a country where their life or freedom would be threatened, could use any arbitrary means to make those determinations without judicial review, sanction or inquiry. The panel majority's ruling leaves low-level INS officials free to flip a coin or spin the cylinder in a revolver to determine whether our country will protect refugees from oppression. The rejection of the rule of law, and the

unfettered discretion to engage in any type of conduct, raise profound issues warranting certiorari review.

### C. This Case Raises A Substantial Question Concerning The Administration Of Justice

The actions of the lower court raise such serious concerns as to the administration of justice that this Court should grant certiorari in its supervisory capacity to correct the actions of the lower court. In rendering its various opinions in this case, the panel majority has gone beyond the role of a tribunal committing inadvertent mistakes or finding law when there is none. It has created facts that are not in the record. App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2-3). It has engaged in fact finding on matters not borne out by the record. *Id.* at 9. It has *sub silentio* disregarded binding *en banc* precedent. *Id.* at 5. It engaged in conduct, in first issuing a stay, then withdrawing it as clerical error and then withdrawing the withdrawal as clerical error, that casts serious doubt on the propriety of the conduct.

Moreover, the Executive insisted with petulance that the court expedite appeals in these cases to the point where full opinions were not written, nor issues addressed, and neither the district court, the per curiam majority, nor the dissents completed the task of a deliberative opinion process. *See* opinions and dissents of December 17, 1991 and February 4, 1992.[16] In fact, the panel majority was so result oriented that it failed "to follow at least two well established principles of American law." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 2). It rushed to the ultimate merits of the case rather than limiting review to the appropriateness of the district court's entry of a preliminary injunction, thereby disregarding circuit precedent. Secondly, "the majority determine[d] the issues on appeal as though they are purely matters of law, without considering the District Court's findings of fact." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 3).

This case also involves the use by the Respondents of fraudulent declarations which, after disclosure, continued to be used in the court of

[16] In short, there was a speculative claim of harm and emergency that rivaled the alleged emergencies of *Korematsu v. United States*, 323 U.S. 214 (1944), the *Steel Seizure Cases [Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)], and the *Pentagon Papers Case [New York Times v. United States*, 403 U.S. 713 (1971)], all combined into one.

appeals, and even in this Court when the Respondents sought an emergency stay.[17]

Similarly, the Respondents provided affidavits to this Court and to the lower court which were not part of the record in the case, and relied on "facts" discussed in those affidavits as if they were part of the record. These affidavits were not only used in an improper fashion as if they were part of the record, but were in most instances simply disingenuous.[18]

[17] In their submissions to the district court, court of appeals and to this Court in their Emergency Stay Pending Appeal, the Respondents relied upon the declaration of Robert K. Wolthuis. Mr. Wolthuis' affidavit, however, was a sham. He was presented as acting in the capacity as the Assistant Secretary of Defense in his declaration, when his deposition revealed that he had assumed that position for one day and one day only -- the day he signed the declaration. App. 78 (Wolthuis Dep. at 5-6). Mr. Wolthuis admitted that he had never served in that capacity before, and he resigned it after the signing and has not acted in that capacity since. App. 78 (Wolthuis Dep. at 6). Moreover, although he stated in his declaration that he "has been closely and regularly involved in the formulation and implementation of U.S. policy concerning the Republic of Haiti," he stated in his deposition that he had only a vague understanding as to what the policy was, was not involved in formulating the policy, was aware of no written or other formal memorialization of any such policy, and was only involved in the matters to which he swore for part of one day. App. 78 (Wolthuis Dep. at 10-13). Wolthuis, in fact, simply signed a declaration which was handed to him and prepared for him by Respondents' lawyers, readily admitting that the sole basis for most of the facts that he swore to in his declaration were what the lawyers who had drafted it told him. App. 78 (Wolthuis Dep. at 31-34). The declaration was so defective and based upon fraudulent assumptions that Petitioners filed a separate memorandum concerning the declaration. When this case is finally reviewed, Petitioners believe this matter requires special scrutiny. Presently, his assertions should be noted as part of the course of conduct of the proceedings below. *See* App. 61 (HRC's Memorandum Concerning the Declaration of Robert K. Wolthuis).

[18] The Respondents relied, for example, on the affidavit of Admiral Leahy, which asserted that allowing a representative from the Haitian Refugee Center on Coast Guard cutters "would seriously interfere with the performance of [its] missions, and also create substantial threats to the safety of all involved," App. 73 (Leahy Decl. of Jan. 29, 1992), a statement repeated by the lower court in its discussion of the First Amendment. App. 56 (Feb. 4 appellate order at 36). Mr. Leahy, in his deposition, however, acknowledged that family members of Coast Guard members periodically go on Coast Guard cutters, and that his 14 year old son was on a Coast Guard cutter on a law enforcement mission while maintaining defense

This case also raises grave concerns about the administration of justice because lawyers representing a class of plaintiffs have been completely barred from speaking with and meeting with their clients, and therefore obtaining facts necessary to represent them in the district court, the court of appeals and before this Court. Counsel for Petitioners learned less than 56 hours before the filing of this Petition that Haitian refugees who had been returned to Haiti under faulty procedures were persecuted upon their return, and fled a second time out of the country and were taken to Guantanamo Naval Base. *See* Declaration of James A. Rogers of Feb. 9, 1992, Exhibit A submitted with Petitioners' Application for Stay. The persecution of persons returned to Haiti is an essential element in Petitioners' claims in regard to irreparable harm, particularly when balanced against an alleged emergency by the Respondents necessitating repatriation of persons at Guantanamo. The government precludes Petitioners' counsel from obtaining this information in a timely fashion for its use in proceedings in this case. There is something fundamentally wrong with a judicial process that would permit opposing counsel and the opposing party to control when, and under what circumstances, Petitioners' counsel may see his clients. Indeed, this practice undermines the integrity of judicial administration by preventing the court itself from having access to the truth. Unless the Court grants certiorari, neither the reality nor the appearance of fairness will characterize the administration of justice in the final resolution of the factual and legal issues in this internationally significant case.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

### A. The Panel Majority Decision Below Constitutes An Unprecedented Acceptance Of Content-Based Regulation Of Speech

The majority below upheld the Respondents' efforts to engage in content-based discrimination under the First Amendment by prohibiting Petitioner HRC, Inc. and its attorneys from communicating with class

readiness for a two week period. App. 76 (Leahy Dep. at 43). In addition, Leahy acknowledged that press members, VIPs and other persons were taken on Coast Guard cutters during the interdictions after the Aristide overthrow while HRC was being denied access. App. 76 (Leahy Dep. at 41).

members while permitting others access to Guantanamo on the basis of the content of their message.

> The record reveals that the government has indeed discriminated against HRC based upon the content of its speech. The district court found that the government has 'opened the camps to members of the press and to representatives of the United Nations High Commission on Refugees.' It has allowed access to the refugees to many individuals and groups. But, it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them.

App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 6). This purpose was most directly expressed by John W. Cummings, Acting Assistant Commissioner for Refugee, Asylum and Parole, who conceded that the true reason for the total ban on lawyer access to Guantanamo was that "it would result in advising [the Haitians] as to the process ..." App. 75 (Cummings Dep. at 88).

This Court has recognized that whatever authority the Executive Branch may have to regulate speech in a public or nonpublic forum: "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (O'Connor, J., for the court) (access to government employees on government property). *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 508 (1991) ("Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment (citation omitted) ... The First Amendment presumptively places this sort of discrimination beyond the power of the government"). In this case, the Respondents, while allowing the press, ministers, other organizations and even other lawyers to meet and speak with HRC's members and class counsel's clients, have prevented Petitioners from having any communication whatsoever with the Petitioners. The ban was not incidental, but rather intentionally designed to prevent HRC and counsel from providing their message or advice to the Petitioners. This Court should grant certiorari to reverse this blatant effort

to limit speech based on its content.[19]

### B. The Majority Panel Opinion Is In Conflict With This Court's Decisions And Imposes An Impermissible Burden On The Attorney-Client Relationship By Erecting A Total Barrier To Attorney-Client Communications

The panel majority's holding erects a total barrier to attorney-client communications, conflicting with the long-standing jurisprudence of this Court, invalidating practices that impose even lesser burdens on the attorney-client relationship. *See Geders v. United States*, 425 U.S. 80 (1976) (invalidating a ban on communication between a defense counsel and his client during an overnight recess of the trial at the time when the client was on the witness stand); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (judicial practice prohibiting out-of-state lawyers from appearing pro hoc vice held to constitute an impermissible intrusion on the attorney-client relationship); *Gulf Oil Co. v. Bernard*, 452

[19] The majority seeks to submerge Petitioners' viewpoint discrimination claim by asserting that "the district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination." App. 56 (Feb. 4 appellate order at 32 n.7). This technique illustrates how the panel majority ignores and openly distorts the record, and seeks to create an untrue record, in an apparent effort to bury the substantial merits of Petitioners' claims. Although the district court in its December 3, 1991 opinion noted that, at that point in time, no viewpoint discrimination had been alleged, its subsequent order of December 20, 1991, which was the subject of the instant appeal and directly before the court of appeals, the district court stated that the Respondents had banned access by HRC attorneys, while it had "opened the camps to members of the press and to representatives of United Nations High Commission on Refugees." App. 46 (Dec. 20 order at 9). Respondents' refusal to allow access by HRC counsel, while permitting access by these other groups, was based on the content of the message they feared HRC counsel would communicate. App. 75 (Cummings Dep. at 88). Moreover, Respondents' actions in "opening the camps" to the messages of other groups, but not those of HRC counsel, is further supported by the affidavits of Wenski and Punancy, App. 68 (Wenski Aff.) and App. 31, Exhibit A (Punancy Aff.), neither of which was objected to by respondents. Under Fed. R. Civ. P. 15(b), as a result, the viewpoint-discrimination claim "shall be treated in all respects as if [it] had been raised in the pleadings." No amount of result oriented jurisprudence justified note 7 of the panel majority's decision and it is not denied by the facts of this record.

U.S. 89 (1981) (invalidating order banning communication with counsel of potential class members).

Class action counsel have a special need, and a special ethical responsibility, to communicate with members of the class. Communication is necessary both to provide information and to give advice to class members so that they may participate in the making of litigation decisions and meaningfully exercise their rights, and also so that counsel can obtain information from them needed for the prosecution of a class action. As a result, court orders limiting communication by class counsel with members of the class are strongly disfavored. *See Gulf Oil Co. v. Bernard, supra.*

The circuit court sought to affirm a total ban on the attorney-client relationship by asserting that since the Haitians have no recognized substantive rights, "it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights." App. 56 (Feb. 4 appellate order at 34). This analysis is profoundly circular, is legally and factually untenable, and conflicts with other decisions of this Court. In *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1979), this Court recognized that the right of a person to impart information is not dependent on the right of the person in custody to receive it. This is also true in the immigration context. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) recognized that whether persons outside the U.S. had any rights, the professors inviting Mandel clearly had First Amendment rights.[20]

The court of appeals took an impermissibly restrictive view of the role of counsel in communicating with his clients. Consultation with and advice to members of the class is essential to aid in their participation in the screening procedures to which they are being subjected by Respondents, even if they have no right to complain about whether or not the procedures are being conducted fairly. Indeed, as the district court found, such assistance can only facilitate the proper effectuation of the screening process. App. 42 (Dec. 3 Mem. Op. at 50-51).

Moreover, many class members may have additional rights in the proceedings of which they may be unaware. These individuals have a vital need for information and advice concerning such rights. It is possible, for example, that some of these individuals may have alternative bases for seeking relief from interdiction, from return, or for legal entry into the

[20] Moreover, as Judge Hatchett recognized in his dissent, "such a determination of the Haitians' rights should be made only after they have received the benefit of counsel." App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 9).

U.S. Some, indeed, may be resident aliens entitled to entry, as was the case of an affiant in this very proceeding. *See* App. 2, Exhibit A (Jolicoeur Aff.). Counsel's need to communicate with class members also extends to the need to advise class members concerning what it means to participate as a member of a class in a class action, what rights they have to opt out of the class, the consequences of not doing so, and other strategic decisions that may be made in litigation, including settlement. The lower court's opinion displays a truncated conception of the role of counsel that is contrary to the precedents of this Court, and warrants review.

### C. The Holding Below Conflicts With This Court's Settled First Amendment Jurisprudence

As this Court and the lower federal courts have recognized in cases litigated over the past dozen years, Petitioner Haitian Refugee Center, Inc. is a political action organization which provides legal representation to Haitian refugees as a major aspect of its political activities.[21] As a result, HRC has a First Amendment right to inform individuals of their rights, at least when they do so, as here, as an exercise of political speech, without expectation of remuneration. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). This is most clear when, as here, the association seeks to provide representation to its members in judicial proceedings, but is also true when the association seeks to provide representation to its members in administrative proceedings "to advocate their causes and points of view ..." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *United Mine Workers District 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967). The court below sought to avoid this clear conflict with controlling Supreme Court precedent by its asserted distinction that class members were in custody. But this Court has never suggested that the First Amendment does not apply when persons seek to convey their message to those in custody. *See*

[21] *E.g., McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 894 n.8 (1991); *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985); *Haitian Refugee Center, Inc. v. Nelson*, 694 F.Supp. 864, 874-75 (S.D. Fla. 1988); *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 531-32 (S.D. Fla. 1980), *aff'd as modified sub nom., Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

*Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). As this Court recently stated in *Thornburgh v. Abbott*, ___ U.S. ___, 109 S.Ct. 1874, 1878 (1989), in citing numerous Court precedents, "nor do [prison walls] bar free citizens from exercising their own constitutional rights by reaching out to those on the inside." The lower court's claim that custody bars a person from communicating his ideas to those political refugees "inside," thus directly conflicts with numerous decisions of this Court.[22]

### D. The Panel's Opinion Violates The Governing Interpretation Of The Treaty, Statutory, And Administrative Provisions Protecting Refugees Fleeing Persecution And Offends Controlling Precedents Of This Court Establishing A Strong Presumption In Favor Of Judicial Review

All relevant international and federal law mandate a single, unambiguous directive: that the executive *shall not return* political refugees to a country where they will face persecution or death because of their political views. That directive entails two necessary safeguards: that the Executive will employ regular and meaningful *procedures* to determine whether a refugee will face political persecution; and that such administrative decisions are not committed to agency discretion, but fully subject to *judicial review* under the Administrative Procedure Act. The majority opinion below rendered erroneous rulings regarding Article 33 of the United Nations Convention and Protocol on the Status of Refugees, the U.S.-Haitian interdiction agreement and the accompanying Executive Order and INS Guidelines, Section 243(h) and 208 of the INA, and the Administrative Procedure Act. Taken together, those rulings have

[22] The panel majority's assertion regarding the difficulties with access, App. 56 (Feb. 4 appellate order at 36-37), ignores the issue on appeal, which was not the time, place and manner of the access, but the Respondents' insistence on a total ban. It also assumes facts which were not in the record in this case. App. 56 (Feb. 4 appellate order, Hatchett, J., dissenting at 8-9). The panel majority decision also conflicted with the Eleventh Circuit's own controlling precedent, which previously had rejected this very distinction, and applied *Primus* and *Button* in the identical situation involving access to excludable aliens held in custody by the Immigration and Naturalization Service. *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (*en banc*) ("counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration").

effectively nullified the rule of law in this case by gutting both the directive *and* the safeguards.

Article 33 of the United Nations Convention and Protocol Relating to the Status of Refugees is a solemn undertaking by our nation not to return persons to a country where their life or freedom would be threatened. As the uncontradicted record in this case demonstrates, Petitioners fear and risk "death or persecution," App. 42 (Dec. 3 order at 55), if they are returned to Haiti. Notwithstanding the significance of Article 33, the panel majority below, without discussing the irreparable harm to Petitioners if they were forcibly returned to Haiti, limited its consideration of the applicability of Article 33 to one sentence. App. 56 (Feb. 4 appellate order at 3). The applicability of Article 33 to the Petitioners in this case, who number in the thousands, as well as countless other refugees outside this case, raises significant and recurring questions that this Court should address. This Court, just this term, referred to Article 33 and our mandatory "obligation" under it on at least two occasions. *United States v. Ray, supra; INS v. Doherty, supra*. The panel majority's insufficient treatment of this issue deserves review in light of the recurring importance of this question.

This case also raises important and recurring questions concerning the interpretation of the agreement between the United States and Haiti about interdiction and the Executive Order implementing that interdiction. The administration of this controversial Interdiction Program singling out Haitians warrants this Court's review. As in its treatment of Article 33, the panel majority provided little analysis of the applicability of the Executive Order, notwithstanding its central importance as the document under which all exercise of Executive power in this case may, or may not, be justified. App. 56 (Feb. 4 appellate order at 21-22).

This case similarly raises important and recurring questions concerning the interpretation of INA §§ 243(h) and 208. Section 243(h) reflects a committment by the United States not to deport or return a person to a country whose life or freedom would be threatened. In light of the continuing nature of the Interdiction Program and the substantial likelihood that persons from other countries will seek refuge in the United States, this Court should grant review to correct the panel's serious misinterpretation of the law.

Most egregiously, the majority opinion rejects applicability of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA") on the ground that judicial review is precluded under 5 U.S.C. § 701(a)(1). Although no express preclusion of judicial review is contained in any relevant statute or reflected in Congressional intent, the majority finds that

preclusion must have been *intended* by Congress as a result of the statutory scheme under the INA in which judicial review is limited in the deportation and exclusion contexts. *See* 8 U.S.C. §§ 1252(b), 1105(a). *See Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). This approach, however, is flatly inconsistent with the decisions of this Court in *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), and *Jean v. Nelson*, 472 U.S. 846 (1985). Thus, despite the identical limitations of judicial review in the exclusion and deportation contexts, neither being involved here, this Court applied the broad presumption in favor of judicial review to permit review of procedures applied by the Immigration and Naturalization Service in regard to the processing of applications for Special Agricultural Worker status (*McNary*), and decisionmaking concerning the release of excludable aliens from detention (*Jean*).

In addition, the court of appeals decision is flatly inconsistent with the approach of this Court in *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) and *Marcello v. Bonds*, 349 U.S. 302 (1955). While the district court recognized that Petitioners' claims were not based on a challenge to any individual alien's determination, but rather on the procedures used in making such determinations, a distinction recognized by the majority below, App. 56 (Feb. 4 appellate order at 20), the majority wholly failed to address such decisions as *Bowen* and *McNary*, which recognize the distinction with regard to judicial review between the substantive determination made by an agency, and the method it utilizes in reaching it.

Moreover, the APA provides that a "[s]ubsequent statute may not be held to supercede or modify this subchapter, chapter 7 [the judicial review provisions of the APA] ... except to the extent that it does so expressly." 5 U.S.C. § 559. In *Marcello*, this Court recognized that only when Congress expressly so provides will the APA be held inapplicable. Here, however, there is no such express indication by Congress, and Congress' limited review provisions for exclusion and deportation cannot be deemed to reflect an express intent that the APA not apply with regard to judicial review of immigration action in other contexts, as *McNary* and *Jean* hold.[23]

[23] That the majority's opinion conflicts with controlling authority of this Court is further demonstrated by the fact that the majority relies for its preclusion holding on *Braude v. Wirtz*, 350 F.2d 702 (9th Cir. 1965) and *Cobb v. Murrell*, 386 F.2d 947 (5th Cir. 1967), both of which have been eclipsed by subsequent decisions of this Court, and two decades ago, it was obvious that "their holdings are no longer

The majority below also found the APA inapplicable under 5 U.S.C. § 701(a)(2) on the ground that INS action here is committed to agency discretion. While acknowledging that this is a "narrow" standard applicable only where there is "no law to apply," App. 56 (Feb. 4 appellate order at 20, *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), the majority finds that the broad discretion granted the President under 8 U.S.C. § 1182(f), one of the provisions relied on by the President in adopting Executive Order 12324 establishing the Haitian Interdiction Program, commits to agency discretion all procedural questions concerning implementation of the Interdiction Program. App. 56 (Feb. 4 appellate order at 21). Although citing the "no law to apply" standard of *Overton Park*, the majority below grossly misapplies this "narrow" exception by ignoring the clear and mandatory standards in the Executive Order itself, as well as the established distinction between review of the substance of an agency's determination and the method it uses in reaching it. *See Bowen, supra*; *McNary, supra*.

The Executive Order upon which the majority relies states that "no person who is a refugee will be returned without his consent." Not only does this supply the substantive law to apply, but the Executive Order also mandates fair process in the application of the standard: "The Attorney General shall ... take whatever steps are necessary to insure the fair enforcement of our laws relating to immigration (including effective implementation of this Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." App. 2, Exhibit B (Executive Order 12324, § 3). Under the majority's approach, where there is substantive law to apply but not detailed specification of procedural standards, an agency could make the relevant substantive determination by flipping coins, and this would be committed to agency discretion. Although the substance of agency decisions sometimes is committed to agency discretion, the procedure used by an agency in reaching its decisions never is, but is always open to judicial review for procedural fairness. *See Bowen, supra; McNary, supra*.

The majority below ignores the fact that the governmental action challenged here is not that of the President, but rather, that of subordinate governmental officials carrying out the President's directives. There is ample law to apply that constricts the discretion of such officials, including the Executive Order itself, INA § 243(h), and the INS Guidelines (P.E. at 8-11). The regulations pursuant to INA § 243(h) and the INS Guidelines

tenable." *Secretary of Labor v. Farino*, 490 F.2d 885, 889 (7th Cir. 1973).

themselves set forth detailed procedures, which were not followed here, that constrict agency action and provide a source of law for a reviewing court to apply. Certiorari should be granted to review the unprecedented approach to the "committed to agency discretion" doctrine of the majority opinion, which would broaden the exception considerably beyond the "exceedingly narrow" one contemplated by *Overton Park*.

Respectfully submitted,

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By: _____
IRA J. KURZBAN, ESQ.

# EXHIBITS

**Executive Order 12324 of September 29, 1981**
**Interdiction of Illegal Aliens**

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1) in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Section 2.(a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (48 U.S.C. § 1451 et seq.), or owned in whole or in part by the United States, a citizen of the United States or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TLAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate

directive providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Section 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating to take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

THE WHITE HOUSE
September 29, 1981

## U.N. CONVENTION RELATING TO THE STATUS OF THE REFUGEES

### ARTICLE 33

### *PROHIBITION OF EXPULSION OR RETURN* ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

**HAITI**

Migrants -- Interdiction

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

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The American Ambassador to the Haitian Secretary
of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 237 September 23, 1981

Excellency:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Government confirms the understandings discussed by representatives of our two governments for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January

1967,* the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise

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* TIAS 6577; 19 UST 8223.

agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a representative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperation program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply constitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREZO

His Excellency
Edouard Francizque
Secretary of State for Foreign Affairs
Port-au-Prince

## U.S. IMMIGRATION AND NATURALIZATION SERVICE

## INTERDICTION GUIDELINES AND OPERATION INSTRUCTIONS

## HMIO

### PURPOSE

To stop the clandestine migration of numerous residents of Haiti to the United States while insuring through direct interview that the United States is in compliance with its obligations regarding actions toward refugees.

### AUTHORITY

Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).

Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).

Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.

Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

### CHAIN OF COMMAND

INS employees involved in HMIO activities will be under the direct line supervision of the Associate Commissioner, Examinations, Central Office through the Assistant Commissioner for Refugee, Asylum, and Parole who has direct responsibility for the HMIO program.

INS employees involved in HMIO activities are subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessels. All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel. All announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and

passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

## INS ROLE IN AND GUIDELINES FOR INTERDICTION AT SEA

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

**GENERAL**

* Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

* The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

* The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

* Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

**AUTHORITY**

Presidential Proclamation Number 4865, dated September 29, 1981.

Executive Order Number 12324, dated September 29, 1981.

Associate Attorney General's directive to the Acting Commissioner, INS, dated October 2, 1981.

Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

**BOARDING OF VESSELS**

* All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

* INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

* All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

**INS OFFICER RESPONSIBILITIES**

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person's name, date of birth, nationality, home town, all documents or evidence presented, and the reason for departure.

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim).

**CHANGES**

The above provisions are subject to revision ...